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No. 08-748

Supreme Court, U.S.
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In the

Supreme Court of the United States

VIVIAN L. HAUSCH,

Petitioner,

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the New York State Court of Appeals

REPLY

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January 19, 2009

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STATEMENT

The petitioner's response to the respondent's Preliminary Statement follows. Page references are to its brief.

Page 1: Six of the eight charges were not predicated upon the petitioner's alleged misconduct in response to zoning code enforcement efforts. Proof of this is that the respondent submitted CPLR Article 78 proceeding papers at the hearing and refused petitioner's demand to make the record from the village court proceedings against her and her corporate client part of the record in the disciplinary hearing.

Pages 2-3 (a) and (b): References to "lawful directives of the Village of Tuckahoe" and petitioner's "conduct with respect to the Village of Tuckahoe" are improper because all of the informations issued against the petitioner were dismissed and the village justice was unanimously reversed on appeal.

Page 4, footnote: Part of the record in the Appellate Division is documentation proving compliance with continuing legal education requirements, which is part of an application for reinstatement to practice. There are no outstanding judgments against P&N Tiffany Properties Inc. The respondent submitted an internet paper showing *PAN* Tiffany Properties Inc. owed the state tax commission $767.00 on 2/8/05. The Appellate Division took no issue with the petitioner's statements on these matters.

Pages 2-7: The petitioner had to resubmit her application for reinstatement because (1) she was initially unaware that the Second Department had recently rewritten its rules to require a form affidavit and (2) she had not received the rejected application back from the court when she submitted her supplemental affidavit using the proper form. This supplement was rejected because there was no application before the court to supplement. The court did, however, retain for the record the respondent's opposing papers, even though there was no application to oppose. The petitioner then submitted a third set of papers, which the court accepted. Subsequent affidavits were necessary because of the clerk's letter and telephone call. The petitioner's final affidavit made it clear to the court that she would not submit her income tax returns because the court was violating her right to privacy, not because she had something to hide.

REASONS FOR GRANTING THE WRIT

I. *Requiring the Submission of Income Tax Returns as Part of a Motion for Reinstatement to the Practice of Law Is a Violation of an Attorney's Constitutional Rights When the Grounds for Suspension Were Not Directly or Indirectly Related to Financial Issues.*

Income tax returns are discoverable "only where a litigant himself tenders an issue as to the amount of his income." *Kingsley v. Delaware, L&W RR. Co.* 20 FRD 156 (SDNY 1957).

To obtain someone's tax records, one must show they are necessary, material, and relevant. *Slate v. Slate* 267 AD2d 839, 699 NYS2d 824 (3d Dept. 1999).

Whereas 26 USC 6103 does not provide for absolute privilege of income tax returns, there is a valid public policy against their disclosure "grounded in the interest of the government in full disclosure of all the taxpayer's income which thereby maximizes revenue. To indiscriminately compel a taxpayer to disclose this information merely because he has become a party to a lawsuit would undermine this policy." *Federal Savings & Loan Assn. v. Krueger* 55 FRD 512 (ND Ill. 1972).

The form affidavit required by the Appellate Division, Second Department, as part of an application for reinstatement to practice is reprinted in its entirety in Appendix L of the petition at pages 25a-32a.

The drafter of the form, the Second Department, clearly attached the income tax return disclosure to paragraph 20, which specifically addresses whether tax returns were filed or, in lieu thereof, whether a filing extension was obtained. By the clear wording of the form, the drafter cared about filing. If a filing extension was obtained, there would be no tax return available to submit. Filing was clearly the only issue.

The respondent may not now offer other reasons for disclosure. However, if the information sought were whether the petitioner had done any

work between the suspension date of December 21, 2006, and the end of the tax year December 31, 2006, the request for income tax returns would be attached to paragraph 14 or 15, the paragraphs that deal with these issues and which, obviously, precede paragraph 20. Further, if there were multiple reasons for demanding income tax returns, the demand would be a separate paragraph at the beginning or the end of the form.

An income tax return does not show all that the respondent assumes it does. In addition, for all but ten days of the reporting year, the petitioner was practicing law in New York State. Further, the petitioner was and still is an attorney in that she is admitted to practice in this honorable court.

St. Regis Paper Company v. U.S 368 US 208, 82 S.Ct. 289 (1961) does not apply because it was the Census Act that was at issue, not the Constitution. Even so, Congress rewrote the Census Act to prohibit disclosure after the case was decided because so many Americans then refused to fill out the forms knowing the information was obtainable by others.

Heatherman v. USDC for the Central District of California 503 F2d 1032 (9th Cir. 1974) is distinguishable because it was decided on FRCP 26(b)(1) grounds. Even so, the court held that tax returns are discoverable only "in appropriate circumstances." In his dissent, Justice Chambers stated that tax returns are not discoverable unless the taxpayer puts them at issue by litigating issues concerning his or her income.

Maggio v. Hynes 423 F.Supp. 144 (EDNY 1976) does not apply because at issue were (1) whether a third party can claim a Fourth and Fifth Amendment privilege against disclosure of a person's tax returns and (2) whether the plaintiff had met the high standard required for injunctive relief, issues not in the instant case. In his dissent, Justice Douglas stated that those amendments "delineate a sphere of privacy, protected from government intrusion," which protects records provided to one's accountant.

Mildner v. Gulotta 405 F.Supp. 182 (EDNY 1975), *affd.* 425 US 901, 96 S.Ct. 1489 (1976) does not apply because (1) the court dismissed the plaintiff attorney's complaint on grounds of abstention and (2) the case involved imposition of discipline, not standards for reinstatement to practice. The court stated that the Referee's duty is to file a report which sets forth his findings of fact and conclusions of law along with the transcript of the proceedings.

Matter of Walker 113 AD2d 254 (1st Dept. 1985) does not apply because the issue involved disbarment and comingling of funds.

Javits v. Stevens 382 F.Supp. 131 (SDNY 1978) does not apply because the issue before the court involved the Civil Rights Act, 42 USCS 1983 and FRCP 12(b)(6), neither of which are at issue herein.

The petitioner agrees with the respondent that the Appellate Division has exclusive power to

resolve issues of misconduct. *Erdman v. Stevens* 458 F2d 1205 (2d Cir. 1972), *cert. denied* 409 US 889, 93 S.Ct. 126 (1972). Requirements for reinstatement ought to be uniform among departments as are standards for admission. At the very least, all must pass constitutional muster and be subject to review on the grounds of other applicable statutes and case law.

In *Theard v. U.S.* 354 US 278, 77 S.Ct. 1274 (1957), citing *Matter of Rouss* 221 NY 81, 116 NE 782 (1917), the attorney prevailed in the instant court. The petitioner takes no issue with the Court of Appeals order confirming disbarment of the attorney for causing a witness to be out of town and unavailable for trial.

The attorney also prevailed in *Matter of Dondi* 63 NY2d 331, 482 NYS2d 431 (1984). In dismissing the grievance committee's complaint against the attorney because of improper disclosure, the Court of Appeals held that a disclosure order must be "subject to meaningful review" on appeal. Because the Appellate Division's order was not "legally cognizable," the Court of Appeals dismissed the grievance committee's complaint in its entirety.

In Matter of Capaccia 59 NY2d 549, 466 NYS2d 268 (1983), the attorney prevailed. The Court of Appeals reversed the Appellate Division order suspending the attorney because the Appellate Division had denied the attorney the right to have a public trial.

The petitioner agrees with the respondent that the practice of law "is a privilege surrounded with public interest but vested as well with a private responsibility." *Matter of Wysell* 10 AD2d 199 (1st Dept. 1960).

The petitioner cannot address the respondent's claim regarding thirteen other states because the respondent has again failed to provide citations, failed to specify judicial departments, and failed to specify whether disbarment or suspension was at issue and, if the latter, after what period, and whether tax returns are related to the grounds for discipline. Even so, it appears that thirty-six states do not require them.

The respondent's statement that the First, Third, and Fourth departments of New York State require the submission of tax returns is a blatant falsehood. Those departments' rules for reinstatement are reprinted as Appendices M, N, and O of the petition. The rules speak for themselves.

The instant case is unique because (1) the entity forcing the disclosure is a government entity, the judiciary, for its own use and not the use of a litigant, (2) the income tax returns are not relevant to the grounds on which the petitioner was disciplined, (3) the petitioner did not put her tax returns in issue, (4) the court never articulated a reason to have the tax returns, (5) by the Second Department's own wording, the tax returns are to prove filing, and proof could have been had by a less restrictive means, (6) the respondent, which is a

committee of the Second Department, has demonstrated an extraordinary interest in the petitioner's private life by going through her personal mail at her home, sitting outside her home and watching her, and following her around in a vehicle.

II. *An Attorney May Not Properly Be Denied Reinstatement to the Practice of Law When She Has Been Treated Differently From Other Attorneys.*

The doctrine of *res judicata* does not apply because neither the Appellate Division nor the Court of Appeals has ruled on these issues, or even addressed them.

A statute of limitations time bars a party's remedy. The facts are still the facts. The petitioner is presenting earlier facts to show a course of conduct culminating in the recent denial by the Appellate Division, Second Department, of petitioner's application for reinstatement to the practice of law, which was timely appealed to the Court of Appeals and timely appealed to the instant court, as well as to rebut the respondent's claim that the petitioner wants to be treated differently from other attorneys.

With one exception, the respondent has not rebutted the facts in the petition when presented to the Special Referee in papers or testimony, to the Appellate Division, or to the Court of Appeals. The one exception was to the Court of Appeals on the issue of Mr. Strauss' gaining of a position on the

bench. If truthful, his statement shows he never spoke directly to Judge Fuller.

There is a recent case related to the petitioner's argument regarding the Appellate Division, Second Department, and the clerk of that court.

In *Kaufman v. Kaye and Prudenti* LEXIS 25351 (EDNY 2005), affd. 466 F2d 83 (2d Cir. 2006), *cert. denied* 127 S.Ct. 1828, 167 L.Ed.2d 320 (2007), the plaintiff alleged that Chief Clerk Pelzer had assigned two Appellate Division, Second Department, justices to four of five of his cases and one justice to three of five of his cases because they were biased and would rule against him on appeal. The case was dismissed on jurisdictional grounds. In dicta, the court stated that the Appellate Division, Second Department is not required to assign cases on a random basis, and to prove bias a litigant must show the bias stemmed from "non-juridical data." The three justices were Justice Krausman, Justice Adams, and Justice Crane. Justice Adams was on the panel of *P&N Tiffany Properties Inc. v, Maron, et al.* 34 AD3d 548, 823 NYS2d 676 (2d Dept. 2006), the one appeal by P&N Tiffany Properties Inc. that was not assigned to Justice Miller. Justice Adams and Justice Crane were on the panel that issued the opinion and order that suspended the petitioner from the practice of law. (Petition Appendix E, at p. 7a.)

CONCLUSION

For the reasons set forth above and in the petition, it is respectfully submitted that the petition for a writ of certiorari ought to be granted.

Dated: White Plains, New York
January 19, 2009

Respectfully submitted,

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